

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2014-009229

01/16/2015

HONORABLE J. RICHARD GAMA

CLERK OF THE COURT  
T. DeRaddo  
Deputy

HERITAGE VILLAGE I I HOMEOWNERS  
ASSOCIATION

SHELTON L FREEMAN

v.

RICHARD WEINBERG, et al.

J ROGER WOOD

**FINDINGS OF FACT AND CONCLUSIONS OF LAW  
RULING**

**PROCEDURAL HISTORY**

On July 2, 2014, HVII commenced this action by filing a Verified Complaint and contemporaneous Order to Show Cause, seeking a declaratory judgment, *inter alia*, against Defendants Richard and Laine Weinberg ("Defendants") for their unauthorized demolition of their previous home and construction of a new home on Lot 36. An initial Order to Show Cause hearing was held on July 14, 2014. Following the brief July 14, 2014 hearing, the Court set an evidentiary hearing for October 8, 2014 and ordered the parties to participate in a private mediation by August 13, 2014. The parties attended a mediation on August 12, 2014. No resolution was reached.

In lieu of filing an Answer, Defendants filed a Motion to Strike HVII's Verified Complaint ("Motion to Strike") on August 12, 2014, asserting that the Verified Complaint contained too much information preventing Defendants from understanding the claims stated against them. HVII filed a Response thereto on August 25, 2014. The Court denied Defendants' Motion to Strike on September 18, 2014. Thereafter, on the eve of the evidentiary hearing, October 6, 2014, Defendants filed an unverified Answer.

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On the day of the evidentiary hearing, October 8, 2014, Defendants filed a Motion to Dismiss for Failure to Join Indispensable Parties (“Motion to Dismiss”). The parties attended the scheduled October 8, 2014 hearing, wherein Defendants invoked the rule of exclusion of the witnesses. Exhibits 1-93, 95-99, 101-103, 106-111, 113-124, 126-137, and 139-156 were received into evidence. HVII’s witnesses Jaime Uhrich and Melissa Kemp were sworn in. For scheduling purposes, Defendants’ witness Jacqueline Monty was sworn in out of sequence and provided testimony before the completion of Ms. Kemp’s examination. At the conclusion of the October 8, 2014 hearing, Defendants completed their cross-examination of Ms. Kemp. Due to Defendants’ scheduling conflicts, the hearing was continued until November 5, 2014. The Court once again directed the parties to participate in mediation prior to the November 5, 2014 hearing, but the mediator named by the Court was unavailable prior to the next hearing date. HVII filed a timely response to the Motion to Dismiss on October 24, 2014. Defendants opted not to file a reply.

The hearing resumed on November 5, 2014, taking an additional two (2) full days to complete. HVII completed redirect examination of Ms. Kemp and called Charles Drott and Mark Brekhus as additional fact witnesses. Thereafter, HVII rested its case in chief. Defendants moved for a directed verdict, which the Court denied. Defendants then presented their case, calling Jay Turner, Cory Rogin and Defendant Richard Weinberg. Defendants also called Ron McCarroll, whom, while listed as a witness, Defendants had represented to HVII would not be called. Defendants then rested their case. As part of their rebuttal presentation, HVII recalled Jamie Uhrich and Mark Brekhus. HVII also called Patti Pardi Winkler as a rebuttal witness. Defendants objected to Ms. Winkler’s testimony, as she was not named on HVII’s Witness List. HVII explained that the only reason Ms. Winkler had not been listed was because the hearing was to be a one (1) day event and Ms. Winkler was unavailable that day. However, HVII found it necessary to present testimony from Ms. Winkler in light of the testimony presented by Defendant Richard Weinberg regarding, *inter alia*, the actions and statements made by Ms. Winkler. HVII explained to the Court that HVII’s Witness List included “any witnesses listed by Defendants.” Ms. Winkler was listed by Defendants in their Witness List as she is both a former member of HVII’s Board of Directors and its Architectural Committee.<sup>1</sup> The Court allowed Ms. Winkler’s testimony over Defendants’ objection. Thereafter, HVII rested.

These findings of fact and conclusions of law are for the purpose of deciding HVII’s Order to Show Cause on its declaratory judgment action against Defendants.

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<sup>1</sup> Defendants’ Witness List named “any necessary rebuttal witnesses,” “any and all members of the Association Board of Directors, both past and current who have had dealings with the Lot 36 construction,” and “any and all Architectural Committee Members, both past and current who have had dealings with the Lot 36 construction.” *See* Defendants’ List of Witnesses and Exhibits.

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**FINDINGS OF FACT**

1. HVII is a duly formed Arizona non-profit corporation comprised of 108 members, located in Scottsdale, Arizona. Trial Exhibit 1 (HV000001-13-C).

2. HVII's affairs are managed by the Board of Directors ("BOD") who have the duty and authority to preserve the common interests of the members. Trial Exhibit 2 (HV000029-38).

3. Defendant Richard Weinberg testified that he and his wife, Laine Weinberg, are members in HVII, owning Lot 36, 7861 Via Marina, HVII, Scottsdale, Arizona. Prior to purchasing Lot 36, Defendants owned another lot within HVII.

4. From January 2012 until approximately the week of April 21, 2014, when the BOD removed him from that office, Defendant Richard Weinberg testified that he was the President of HVII's BOD. Defendant Richard Weinberg continues to hold a position as a member at large of the BOD.

**Amended and Restated Declaration of Covenants, Conditions and Restrictions**

5. On or about May 24, 2007, HVII adopted an Amended and Restated Declaration of Covenants, Conditions and Restrictions ("ACC&R"). The ACC&R expressly amended, restated, superseded and replaced the Original CC&R and was recorded in the Official Records of Maricopa County, recording number 200706453902, on or about June 4, 2007. Trial Exhibit 1 (HV000001-13-C).

6. The restrictions set out in the ACC&R expressly run with the real property and are made binding on all parties having or acquiring any right, title or interest in HVII, and expressly inure to the benefit of each owner within HVII. Every conveyance of real property within HVII, including Defendants' lot, is expressly made subject to the covenants, conditions, charges, liens, easements and restrictions set out in the ACC&R. *Id.* at page 1 (HV000001-C).

7. "Member" is defined in the ACC&R as every person or entity who is a Lot owner; each member is subject to the provisions of the ACC&R and those of McCormick Ranch and McCormick Ranch Property Owners' Association ("MRPOA"). *Id.* at page 2 (HV000002-C).

8. By express declaration, the ACC&R establish and impose a general plan for the improvements of all property within HVII and establishment of covenants, conditions, charges, liens, easements and restriction upon all structures or house units constructed thereon, and upon the use, occupancy and enjoyment thereof. *Id.* at page 2 (HV000002-C).

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9. Pursuant to the ACC&R, HVII has architectural control over the lots within HVII for the purpose of enhancing and protecting the value, desirability and attractiveness of the real property for the benefit of the common interests of its members. *Id.* at page 1 (HV000001-C).

10. The ACC&R expressly grants the Architectural Control Committee (“ACC”) and BOD “the right to deny approval of any plans or specifications which are not, in its opinion suitable or desirable for aesthetic or any other reasons,” and the ACC and BOD expressly “have the right to take into consideration the harmony and conformity of the building with the surrounding area and the effect of such structure or building as seen from adjacent or neighboring properties.” *Id.* at page 7, Art. III (HV000007-C).

11. In order to fully and reasonably apply the discretion granted the ACC and BOD under the ACC&R, at Art. III, “to take into consideration the harmony and conformity of the building with the surrounding area and the effect of such structure or building as seen from adjacent or neighboring properties,” the ACC and BOD must make a case by case determination of each architectural change submitted based on the specific type and combination of changes requested, taking into consideration the location of each lot and the effect on the surrounding neighboring lots. Accordingly, the ACC&R provides that the decision of the BOD not to take an enforcement action against any owner is not a waiver of its right to do so against another in the future. *Id.* at page 12, Art. VIII (HV000012-C).

12. In order to ensure HVII has the opportunity to exercise its right of architectural oversight, before any external additions, improvements or modifications can be made to any structure by any member, both the ACC and the BOD must grant prior written approval. *Id.* at page 4 (HV000004-C).

13. Before a final written approval for an architectural change can be made by the ACC and BOD, the ACC&R expressly requires the member to submit “the plans and specifications for the same, showing all construction details, including the nature, shape, height, materials, floor plans, locations and approximate cost thereof” to the ACC and BOD for prior written approval. *Id.* at page 7, Art. III (HV000007-C).

14. The ACC&R expressly provides that any exterior changes, modifications, additions or deletions made by a member without prior written approval of the ACC and BOD may be subject to removal or change at the member’s expense. *Id.* at page 4 (HV000004-C).

15. Neither the BOD nor the ACC have the ability to waive the express requirements of the ACC&R.

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16. HVII has the right to enforce the terms of the ACC&R, and “shall strictly enforce” its architectural restrictions and limitations. *Id.* at page 5 (HV000005-C). The ACC&R grants HVII the express right to enforce any provision of the ACC&R by restraining the violating conduct and recovering damages caused by the violation. HVII also has the express right to recover all costs associated with enforcing the ACC&R, including, but not limited to, recovering its reasonable attorney’s fees, court costs, out of pocket expenses, costs of investigation and all other expenses related to the enforcement action. *Id.* at page 11 (HV000011-C).

17. The ACC and BOD have thirty (30) days to approve or deny an architectural change request submitted by a member. In order for the 30 day approval period to begin to run, the ACC&R expressly provides that the homeowner making the architectural change request must have first submitted “all required documentation.” *Id.* at page 7, Art. III (HV000007-C).

18. If no approval or disapproval has been given within the 30 day period after delivery of all required documentation to the ACC and BOD, the ACC&R provides that no approval is required and the request will be deemed to have been approved. *Id.* at page 7, Art. III (HV000007-C).

19. In order to allow a member the opportunity to correct a violation of the ACC&R prior to enforcement, the ACC&R grants homeowners ninety (90) days “to return the property to its prior condition” upon notice to do so by HVII. *Id.* at page 7, Art. III (HV000007-C).

20. The ACC&R expressly provides that violation of the provisions governing HVII are not limited to damages at law and such damages alone may not constitute an adequate remedy for the violation(s) incurred. *Id.* at page 12 (HV000012-C).

21. Defendant Richard Weinberg testified that Defendants were aware they had to comply with the requirements of the ACC&R.

22. Defendant Richard Weinberg further testified that he knew, as the President of HVII’s BOD, that he would have to make sure Defendants strictly complied with the requirements of the ACC&R in seeking architectural variances to Lot 36.

23. The Court finds as a matter of fact that Defendants, at all times, knew they had to comply with the express requirements of the ACC&R and fully understood their obligations to obtain prior written approval from both the ACC and the BOD before making any architectural changes to their lot.

24. The Court further finds as a matter of fact that Defendants fully understood that if they chose to make an external change to their lot prior to obtaining prior written approval from the

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ACC and BOD and the BOD later determined that changes had to be made to comply with the ACC&R, they would be responsible for all costs associated not only with the changes required but the costs incurred by HVII relating to any enforcement action.

**Master Planned Community-McCormick Ranch**  
**Property Owners' Association**

25. HVII is a sub-association of McCormick Ranch Property Owners' Association ("MRPOA"), a master planned community. The ACC&R expressly provides that HVII's members are subject to the restrictions imposed by the MRPOA. Trial Exhibit 1 at page 2 (HV000002-C).

26. If there is a conflict between the requirements imposed by HVII and MRPOA, the ACC&R provides that the restrictions of MRPOA control. *Id.* at page 2, Art. I (5) (HV000001-C) ("Each member is subject to the provisions of these [ACC&R] and those of McCormick Ranch and the McCormick Ranch Property Owners' Association."); and, *Id.* at page 8, Art. III (HV000008-C) ("If any part of this Article is in conflict with those covenants, conditions and restrictions recorded for McCormick Ranch, then the covenants, conditions and restrictions for McCormick Ranch shall prevail.")

27. Jaime Uhrich, MRPOA's Executive Director, testified that MRPOA requires a member of HVII desiring to make an architectural change to the exterior of their property to submit a final approved architectural variance obtained from HVII to the MRPOA and obtain final written approval from MRPOA before beginning any changes.

28. Ms. Uhrich testified that MRPOA will not address an architectural change request submitted by a member of HVII unless HVII has previously approved the request.

29. Ms. Uhrich further testified that HVII's prior approval is important because MRPOA relies on HVII's approval in making its determination of whether to approve an architectural change to a member's property.

30. MRPOA's Declaration of Covenants, Conditions, Assessments, Charges, Servitudes, Liens, Reservations and Easements ("DCCA") expressly requires a member to submit detailed "plans and specifications showing the nature, kind, shape height, materials, color, location and other materials" proposed in an architectural change request before any final approval may be authorized. Trial Exhibit 3, at page 32, Art. X (HV000075-C).

31. The DCCA grants MRPOA the express authority to consider the harmony of the design and location of a proposed architectural change in relation to surrounding structures and

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topography, and in relation to the Master Plan for the development as a whole when determining whether to approve an architectural change request. *Id.* at page 32, Art. X (HV000075-C).

32. Without prior written approval from HVII and MRPOA, a member of HVII may not make an architectural change to their property that affects the exterior of the property. Trial Exhibit 1, at page 8, Art. III (HV000008-C); and Trial Exhibit 3, at page 33, Art. X (HV000076-C).

33. The Court finds as a matter of fact that Defendants, at all times, fully understood their obligations to obtain prior written approval from MRPOA before making any architectural changes to their lot.

**Defendants' Architectural Change Requests for Lot 36**

34. Richard Weinberg testified that Defendants have been members of HVII since December 2009.

35. Between December 2009 and December 2011, Defendant Richard Weinberg did not serve as a member of HVII's BOD.

36. Defendants purchased their second home in HVII in December 2011 known as Lot 36.

37. Defendant Richard Weinberg testified that Defendants purchased Lot 36 with the intent of making changes to the property.

38. Immediately after purchasing Lot 36 in January 2012, Defendant Richard Weinberg testified that he became a member of the BOD. Defendant Richard Weinberg was President of the BOD throughout 2012-2013 and up to sometime in April 2014. Defendant Richard Weinberg remains a member at large of the BOD.

39. Shortly after Richard Weinberg had secured the position as President of HVII's BOD, Defendants began what was initially represented to HVII to be a series of architectural remodeling projects to their lot in or around March 2012, submitting an Application for Architectural Variance to "extend front of house to where arches currently are. Add a 6 ft wall to enclose front patio," which the ACC and BOD approved. Trial Exhibits 6 (HV00122), 7 (HV000123), and 8 (HV000129).

40. Defendants did not make the changes requested in their March 2012 architectural change request according to Richard Weinberg's testimony.

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41. Thereafter, in or around April 2012, Defendants submitted an architectural request seeking to add a second story to Lot 36, which was not received well by either the ACC or the BOD due to height concerns and other issues. Defendants ultimately withdrew their request. Trial Exhibits 9 (HV000130), 10 (HV000132), 11 (HV000135-136), and 12 (HV000133).

42. Subsequently, Defendants submitted an Application for Architectural Variance to HVII dated September 24, 2012, seeking to add a privacy wall in the front, raise the roof to an unspecified height, apply a smooth stucco finish, add new windows, paint an unspecified color, add new stone in the front courtyard, and add an iron gate in front of the home. No detailed construction plans were submitted as part of Defendants' September 24, 2012 Application, merely a one (1) page elevation drawing. Trial Exhibit 15 (HV000258-260).

43. HVII's ACC conditionally approved Defendants' September 24, 2012 Application subject to three (3) conditions: 1) the height of the home was limited to "19 feet or no higher than Lot 27," which was later learned to be 17 feet at its highest point; 2) Defendants were required to resubmit the City of Scottsdale final approved plans and permits to the ACC for approval; and, 3) Defendants were required to notify their immediate neighbors before beginning construction. Final approval for Defendants' architectural changes would not occur until the ACC saw the actual plans for Defendants' proposed changes; neither the ACC nor the BOD could approve Defendants' Application based upon the one (1) page elevation drawing submitted by Defendants. Trial Exhibits 20 (OGD000045), 21 (HV000283), and 23 (HV000147-148).

44. Defendant Richard Weinberg testified that Defendants knew the 2012 approval from HVII's ACC was not a final approval.

45. The Court finds as a matter of fact that Defendants knew the approval they obtained from HVII's ACC for their September 24, 2012 architectural change request was not a final approval. After the conditional approval by HVII's ACC, Defendants' application was then placed on the agenda for consideration during the November 28, 2012 BOD meeting.

46. At the BOD meeting on November 28, 2012, before taking up Defendants' application, there was a discussion regarding the HVII architectural variance form and the need for input by roof-mates for proposed changes. HVII's property manager, Jackie Monty, was directed to update the form to make sure there was a space provided for roof-mates to sign off on proposed changes to the exterior of buildings. Trial Exhibit 23 (HV000147-148).

47. Neighbors who share a common wall with each other in HVII are known as roof-mates.



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48. Defendant Richard Weinberg testified that there was discussion at the BOD meeting on November 28, 2012 regarding getting roof-mate approval on exterior changes.

49. Melissa Kemp, HVII's current BOD President, testified that notification to immediate neighbors before obtaining final approval by the BOD to make architectural changes is important because it allows the neighbors to bring any concerns to the BOD's attention to be timely addressed and assists the BOD in determining whether the request should be approved.

50. Defendants' fact witness, Jay Turner, testified that when he was on the BOD he believed the immediate neighbors and roof-mates should be notified of requests for architectural changes and asked for their approval of the requested changes. Mr. Turner further testified that if he was on the BOD at the time of Defendants' request, he would have required Defendants' roof-mates' approval.

51. Ms. Uhrich testified that the MRPOA requires notification of neighbors when an architectural change request has been made.

52. The Court finds as a matter of fact that notification of neighbors of architectural change requests and getting the neighbors' comments was a common standard in HVII and MRPOA.

53. At the November 28, 2012, BOD meeting, consideration of Defendants' application came after the discussion that led to a change in the variance forms requiring a space for roof-mates' agreement to proposed exterior changes. Trial Exhibit 23 (HV000147-148).

54. The BOD considered the Weinberg application that included the obligations to: (i) provide the City approved plans to the ACC; (ii) limit the height to 19 feet or no higher than Lot 27; and (iii) notify immediate neighbors before beginning construction. A motion was made to approve the application, a second occurred and the motion passed. Trial Exhibit 23 (HV000147-148).

55. Defendant Richard Weinberg testified that Patti Pardi Winkler, the ACC Chair Person in 2012, told him that Lot 27 was 19 feet high.

56. Defendant Richard Weinberg further testified that Defendants did not make any effort to determine the height of Lot 27.

57. Ms. Winkler testified that she never told Defendant Richard Weinberg that Lot 27 was 19 feet.

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58. Ms. Winkler further testified that neither she nor the ACC knew how tall Lot 27 was at the time of HVII's preliminary 2012 approval, which is why the preliminary approval included the language "or no higher than Lot 27."

59. Ms. Winkler further testified that the ACC and BOD wanted to ensure that the Defendants' home was no taller than Lot 27 and intended to limit the height of Lot 36 to that of Lot 27 when it noted that Defendants' request was preliminarily approved to be 19 feet or no higher than Lot 27.

60. The Court finds as a matter of fact that Defendants were not informed by Ms. Winkler, the ACC or the BOD that Lot 27 was 19 feet tall and that Defendants made no effort to determine the height of Lot 27 on their own.

61. Defendant Richard Weinberg repeatedly testified on direct and cross examination that Defendants' plans for Lot 36 always contained a height of 19 feet.

62. Defendants' general contractor and architect, Ron McCarroll, testified that he never prepared plans for Defendants' new home that contained a total height less than 19 feet.

63. The Court finds as a matter of fact that Defendants elected to prepare plans for a new home that was 19 feet in total height.

64. After receiving preliminary approval from the ACC and BOD for their September 24, 2012 Application, Defendants did not make the approved changes. Nor did Defendants submit a request to MRPOA to make any architectural changes. Instead, without HVII's knowledge, Defendants used the preliminary approval to apply for demolition and construction permits from the City of Scottsdale to completely demolish their home and build an entirely new home on Lot 36. Trial Exhibits 24 (COS000091-92), 25 (COS000099), 26 (COS000093-94), 27 (COS000100), and 65 (HV000331-346, 364-366).

65. Mr. McCarroll testified that the City of Scottsdale would not have considered Defendants' demolition and construction application without an approval from the property association.

66. Defendant Richard Weinberg testified that Defendants were aware that the City of Scottsdale required approval from property associations before it would approve a demolition and reconstruction application.

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67. The Court finds as a matter of fact that Defendants knew they were required to submit a written approval from HVII and MRPOA to the City of Scottsdale in order to obtain demolition and construction permits to build a new home on Lot 36.

68. Mr. McCarroll testified that Defendants did not inform him that they were required to obtain MRPOA's approval prior to making any architectural changes to Lot 36.

69. On direct examination, Mr. McCarroll testified that he believed Defendants had all the necessary approvals to demolish the home on Lot 36 and rebuild a new home. But on cross examination, Mr. McCarroll admitted that he cannot say that Defendants had the necessary approvals for demolition and reconstruction of their home on Lot 36.

70. Mr. McCarroll testified that during the time he worked with Defendants, he relied on Defendants' representations that they had all the necessary property association approvals to demolish their home and build a new home on Lot 36 and made no independent investigation of his own.

71. Mr. McCarroll further testified that Defendants never informed him that there was any issue with the height of the home being 19 feet. Mr. McCarroll testified that if he had seen Exhibit 33, the letter from MRPOA dated 10/2/2013 limiting the height to 17', before he started construction, he would have wanted the height issue resolved before proceeding further.

72. The Court finds as a matter of fact that Mr. McCarroll relied on Defendants' representations of having obtained all necessary approval to demolish and rebuild their home on Lot 36.

73. The Court further finds as a matter of fact that Defendants did not provide all information regarding the preliminary approval from HVII to Mr. McCarroll.

74. Defendant Richard Weinberg testified during cross examination that during the process of obtaining their demolition and construction permits from the City of Scottsdale, Defendants did not inform the City of Scottsdale that HVII was a sub-association of MRPOA or that they needed the approval of MRPOA prior to making any architectural change to Lot 36.

75. Defendant Richard Weinberg admitted during cross examination that he did not have any approval from MRPOA at the time he sought the City's approval for a demolition and construction permit.

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76. The Court finds as a matter of fact that Defendants failed to notify the City of Scottsdale that they must have approval from MRPOA prior to undertaking any architectural change to Lot 36.

77. Defendants submitted HVII's preliminary approval of their September 24, 2012 application to the City of Scottsdale to support their application for demolition and construction. Trial Exhibit 65.

78. The Court finds as a matter of fact that Defendants did not inform the City of Scottsdale that the approval from HVII submitted to the City did not pertain to demolishing their home and rebuilding a completely new home on Lot 36.

79. Defendant Richard Weinberg admitted during cross examination that the City of Scottsdale had relied on the approval Defendants submitted from HVII in granting Defendants' demolition and construction permits.

80. The Court finds as a matter of fact that the City of Scottsdale relied on Defendants' representation that they had received all necessary approvals to make architectural changes to Lot 36 in deciding to issue a demolition and building permit to Defendants.

81. Mr. McCarroll and Defendant Richard Weinberg testified that it took many months to get final approval from the City of Scottsdale to demolish and rebuild the home on Lot 36.

82. The Court finds as a matter of fact that during the one (1) year delay between Defendants' September 24, 2012 architectural change request and Defendants' September 25, 2013 architectural change request, Defendants were seeking a demolition and construction permit from the City of Scottsdale.

83. Defendant Richard Weinberg testified that once Defendants received approval from the City of Scottsdale, he contacted Karen Quinn, the then current ACC Chair Person and a member of the BOD, to inquire how to proceed.

84. Defendant Richard Weinberg testified that Ms. Quinn was a close personal friend of Defendants.

85. Defendant Richard Weinberg testified that Ms. Quinn informed him that Defendants should proceed by filing a two (2) part Variance Request, the first to obtain approval to demolish the home on Lot 36 and then, once demolition is approved, submit the "Rebuild plans/addendum (with City approval attached)." Ms. Quinn also pointed out that the request would "need to go to McCormick for their review once HVII approves". Trial Exhibit 113.

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86. Instead of a new Variance Request to demolish the home, Defendants filed an addendum to the September 24, 2012 Application with HVII dated September 25, 2013. The September 25, 2013 variance request sought to demolish Defendants' home, representing that the City of Scottsdale had ordered Defendants to restore their home to the original property line. No request was made to HVII in Defendants' September 25, 2013 variance request to rebuild Defendants' home after demolition. Trial Exhibit 28 (HV000284-286).

87. Instead of waiting until HVII approved the new 2013 variance request as recommended by Ms. Quinn, Defendants simultaneously sought approval from HVII to demolish their home and an application for architectural variance to MRPOA seeking to both demolish their home and rebuild a new home. Trial Exhibit 30 (MR000001-7).

88. Defendants' application for architectural change to MRPOA informed MRPOA that Defendants had received HVII's approval for their request to demolish their home and build a new home on Lot 36. *Id.* at page 1 (MR000001).

89. As they had done in order to get City of Scottsdale approval, as part of their application to MRPOA, Defendants submitted HVII's preliminary approval of their September 24, 2012 Application from the previous year, which did not pertain to the demolition or reconstruction of the home on Lot 36. Trial Exhibit 32.

90. Defendant Richard Weinberg acknowledged during cross examination that he did not have HVII approval for the demolition and/or new construction when Defendants submitted their MRPOA application.

91. This Court finds as a matter of fact that Defendants knew they did not have HVII approval to demolish the home on Lot 36 when they represented to MRPOA that they did have approval.

92. The Court further finds as a matter of fact that Defendants did not inform MRPOA that on the same day they filed their application for architectural change with MRPOA seeking to demolish their home and rebuild a new one Defendants also filed an application with HVII seeking to demolish their home. The Court further finds as a matter of fact that Defendants had not submitted a variance request to HVII to rebuild a home on Lot 36 when they applied to MRPOA for approval to construct a new home on Lot 36.

93. Ms. Uhrich testified that the purpose of requiring a homeowner to have obtained approval for any architectural change from their sub-association prior to submitting an application to MRPOA was to ensure that each sub-association had had a chance review the change request and determine that it met the sub-associations' restrictions.

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94. Ms. Uhrich further testified that the MRPOA relies upon this prior approval requirement when they receive architectural change requests from a sub-association member.

95. Ms. Uhrich testified that MRPOA reviewed the approval from HVII submitted by Defendants as part of their September 25, 2013 application and interpreted the language therein limiting Lot 36's home to "19 feet or no higher than Lot 27" to mean that the home to be built could not be higher than Lot 27. Trial Exhibit 32 (MR000008-9).

96. Ms. Uhrich further testified that because Defendants had represented that their new construction would follow that of Lot 27 and in light of HVII's restriction of the home to no higher than Lot 27, MRPOA's ACC pulled the plans it had on file for Lot 27 and determined that the home on Lot 27 was only 17 feet tall at its highest point.

97. The MRPOA ACC met on October 2, 2013 and approved Defendants' September 25, 2013 application, specifically stating that "height will be limited to 17", per HOA approval." The MRPOA ACC also made the approval subject to securing necessary permits and submitting finish elements prior to installation. Trial Exhibit 34 (MR000012-15).

98. Ms. Uhrich also testified that MRPOA allotted 120 days for Defendants to complete demolition and construction of the new home. Trial Exhibit 33 (MR000010).

99. The Court finds as a matter of fact that MRPOA limited the approval of Defendants' new construction to a height of 17 feet.

100. Ms. Uhrich testified that in October 2013, MRPOA sent Defendants a notification letter, informing them of the preliminary approval and notifying them of the maximum 17 feet height restriction. Trial Exhibit 33 (MR000010).

101. Defendant Richard Weinberg testified that the first time Defendants had received MRPOA's October 2013 letter restricting their approval to a height of 17 feet was in January 2014 when MRPOA notified them that MRPOA's approval had been withdrawn.

102. Defendant Richard Weinberg further testified that Defendants did receive a separate October 2013 approval letter from MRPOA, but that letter made no reference to a height restriction of 17 feet and only granted Defendants 60 days to complete demolition and construction. Trial Exhibit 103. This October 2013 approval letter was subject to the Defendants securing the necessary permits from the City of Scottsdale and submitting all finish elements prior to installation. *Id.*

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103. Ms. Uhrich testified that when it was brought to her attention that there were two (2) different October 2013 approval letters, she reviewed MRPOA's records pertaining to Lot 36, including phone logs. The phone logs indicate that Defendants had called MRPOA in October 2013 stating that they had received two (2) approval letters: (1) one contains a 60 day period to complete work; and (2) the other containing a 120 day period in which to complete the approved work, and informing MRPOA that they could not complete the work in 60 days.

104. Ms. Uhrich further testified that MRPOA's records indicate that there was no record of a 60 day letter going out and that Defendants were told that the correct letter was the 120 day letter because demolition and construction would take more than 60 days.

105. Ms. Uhrich also testified that Defendants' architectural request form indicated that approximately 120 days/6 months were needed to complete the requested change, which was consistent with the 120 day letter MRPOA sent to Defendants. Trial Exhibit 33 (MR000010).

106. Ms. Uhrich further testified that at no time did MRPOA approve Defendants' home to exceed a height of 17 feet.

107. The Court finds that Defendant Richard Weinberg's testimony is not credible on this point and finds as a matter of fact that Defendants received MRPOA's 120 day letter limiting the height of their home to no more than 17 feet in October 2013.

108. The Court finds as a matter of fact that the letter in Exhibit 33 matches the approval granted by the MRPOA ACC in Exhibit 34 and that the approval was limited to a height of 17 feet, notwithstanding the other version of the October 13 MRPOA letter.

109. The Court finds as a matter of fact that Defendant Richard Weinberg's testimony about not receiving Trial Exhibit 34 until January 2014 is not credible and that Defendants were on notice of the 17 foot height limitation in October 2013.

110. In October 2013, Karen Quinn approved Defendants' September 25, 2013 variance request to demolish their home. Trial Exhibit 35 (HV000158-160).

111. Defendant Richard Weinberg testified that the signature of Karen Quinn on Trial Exhibit 28 (HV000284-286) (Defendants' September 25, 2013 Variance Request) represents ACC approval only, not the BOD's approval of the request.

112. The Court finds as a matter of fact that the signature of Karen Quinn on Trial Exhibit 28 was made in her role as Chair Person of the ACC only and reflects only the fact that the ACC approved Defendants' request to demolish their home.

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113. Ms. Kemp testified that pursuant to the HVII Bylaws, unanimous written approval by all of the members of the BOD was needed to approve an action if a vote was taken outside an open BOD meeting. Trial Exhibit 2 (HV000029-38), at page 2, Section 5 (at HV000030).

114. Both Ms. Kemp and Ms. Winkler, who were on the BOD in October 2013, testified that Ms. Winkler did not vote to approve Defendants' request to demolish their home by email.

115. Ms. Kemp testified that the agendas for the BOD meetings are created by the President of the BOD and as President, Defendant Richard Weinberg had absolute discretion of putting things on the agenda to discuss at the meetings.

116. Ms. Winkler testified that during the October 2013 BOD meeting, the BOD did not vote on Defendants' September 25, 2013 Variance Request to demolish their home.

117. Ms. Winkler further testified that she was on the ACC at the time of the September 24, 2012 Approval, which required Defendants to submit City approved plans prior to obtaining final written approval from the ACC and BOD. Ms. Winkler testified that in October 2013, she still believed that Defendants needed to submit City approved plans prior to the ACC and BOD being able to approve Defendants' change request and would have voted against approval if a vote had been taken.

118. On September 27, 2013, Ms. Winkler sent an email to Karen Quinn stating that she was not approving the demolition until the BOD received the City of Scottsdale approved plans. Trial Exhibit 29 (HV000291-294).

119. Ms. Kemp testified that based upon her review of the minutes from the October 2013 BOD meeting, the BOD did not vote on Defendants' September 25, 2013 variance request to demolish their home during the October 2013 BOD meeting. Trial Exhibit 35 (HV000158-160).

120. Defendant Richard Weinberg testified that he does not recall whether a BOD vote was conducted regarding Lot 36's demolition request during the October 2013 BOD meeting.

121. Defendants' fact witness, Cory Rogin, does not recall whether the BOD voted on Lot 36's demolition request during the October 2013 BOD meeting, which she attended as a homeowner.

122. HVII's October 2013 BOD approved Minutes do not reflect a vote taken by the BOD to approve Defendants' September 25, 2013 variance request to demolish their home, although it does reflect vote action taken on other matters. Trial Exhibit 35 (at HV000158).



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123. The Court finds as a matter of fact that HVII's BOD did not vote on Defendants' demolition of their home at the October 2013 BOD meeting, even though Defendant Richard Weinberg had the discretion as President to include it for consideration and require action on it.

124. Sometime between the October 2013 BOD meeting and the November 2013 BOD Meeting, Defendant Richard Weinberg testified that Defendants submitted an elevation drawing to Ms. Quinn relating to the rebuild of the home on Lot 36.

125. Ms. Kemp testified that the elevation drawing submitted by Defendants was one (1) page long.

126. Mr. McCarroll testified that the City approval plans he prepared on behalf of the Defendants were approximately twenty-five (25) pages long.

127. Defendant Richard Weinberg testified that Defendants only submitted a one (1) page elevation drawing to HVII because that is all Ms. Quinn requested from Defendants.

128. The Court finds as a matter of fact that Defendants only submitted a one (1) page elevation drawing to HVII for approval between October and November of 2013.

129. Defendant Richard Weinberg further testified that while Defendants had relied on the September 24, 2012 Approval to obtain City of Scottsdale and MRPOA approvals, Defendants chose to disregard the Approval's explicit language requiring Defendants to submit City approved plans to HVII in order to obtain final approval because Ms. Quinn "did not ask" for the plans.

130. Defendant Richard Weinberg testified that he was unaware of any authority Ms. Quinn had to unilaterally override the express majority opinion and formal decisions of HVII's ACC and BOD.

131. Defendant Richard Weinberg further testified that he was unaware of any authority of Ms. Quinn to unilaterally override the express provisions of the ACC&R.

132. The Court finds as a matter of fact that Defendant Richard Weinberg's testimony regarding the scope of Ms. Quinn's request is not credible, in light of the express language from Ms. Quinn in Trial Exhibit 113 that the Weinberg's submit the "Rebuild plans/addendum (with City Approval attached.)"

133. Both Ms. Kemp and Ms. Winkler testified that they did not vote to approve Defendants' one (1) page elevation plan by email.

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134. Defendant Richard Weinberg testified that there had not been a unanimous email approval of Defendants' elevation drawing.

135. Defendant Richard Weinberg, on direct examination, testified that there was a vote taken at the November 2013 BOD meeting "unanimously" approving Defendants' elevation drawing. On cross examination, Defendant Richard Weinberg, when faced with his October 6, 2014 deposition testimony, which was read out loud in open Court, recanted his prior testimony that the BOD had unanimously approved Defendants' elevation drawings during the November 2013 BOD meeting.

136. When faced with his prior sworn statement, Defendant Richard Weinberg admitted that he could not recall exactly who or how many BOD members had voted to approve Defendants' elevation drawing, but that he was sure Defendants had received approval during the November 2013 BOD meeting.

137. The Court finds that Mr. Weinberg's testimony is not credible as to the issue of whether there was a November 2013 vote by the BOD during the BOD meeting.

138. Defendant Richard Weinberg testified that Defendants submitted to the BOD a full set of plans that were set out on the table for review during the November 2013 BOD meeting.

139. Defendant Richard Weinberg testified that these plans were nearly a full set of plans, although they were not yet approved by the City in November 2013.

140. Ms. Kemp testified that she was present at the November 2013 BOD meeting and never saw a full or nearly full set of Defendants' plans during the meeting.

141. Ms. Winkler testified that she was present at the November 2013 BOD meeting and never saw a full or nearly full set of Defendants' plans during the meeting.

142. Ms. Winkler testified that she would know a full set of plans if she saw them because she had experience reading construction plans such as Defendants' as she had previously been responsible for building a 10,000 sq. ft. home.

143. Mark Brekhus testified that he attended the November 2013 BOD meeting and did not see any plans for Lot 36.

144. Mr. Brekhus further testified that he does not recall the BOD taking a vote during the November 2013 BOD meeting relating to Lot 36.

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145. Defendants' own fact witness, Jay Turner, a former member of HVII's BOD, testified that he attends and participates in BOD's board meetings.

146. Mr. Turner testified that there was an elevation drawing at the November 2013 meeting relating to Lot 36 but he did not look at it.

147. Defendants' own fact witness, Cory Rogin, testified that she does not recall seeing any plans for Lot 36 during the November 2013 BOD meeting, which she attended only as a homeowner.

148. Defendant Richard Weinberg was asked during his cross examination if he recalled testifying at his deposition at pages 43 and 44 that he did not have a copy of the final approved plans from the City of Scottsdale until December 2013; he could not recall.

149. The Court does not find the testimony of Mr. Weinberg credible on this point and finds as a matter of fact that Defendants did not submit more than a one (1) page elevation drawing to the BOD by the time of the November 2013 BOD meeting.

150. Defendant Richard Weinberg testified that there were five (5) BOD members during November 2013, including himself.

151. Defendant Richard Weinberg further testified that he recused himself from all votes relating to Lot 36.

152. Defendant Richard Weinberg went on to testify that a vote of at least three (3) of the four (4) remaining BOD members during November 2013 was required to approve Defendants' elevation plans.

153. Defendant Richard Weinberg further testified that if two (2) of the remaining four (4) BOD members did not vote to approval the elevation drawings, there would have been no valid approval from the BOD.

154. Ms. Kemp testified that Defendant Richard Weinberg, as the BOD President and person solely in charge of calling for votes and putting action items on the agenda for the BOD to address, did not call for a vote during the November 2013 BOD meeting to approve or disapprove any action on Lot 36.

155. HVII's November 2013 BOD approved Minutes do not reflect a vote taken by the BOD relating to Lot 36, although it does reflect vote action taken on other matters. Trial Exhibit 40 (HV000287-290).

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156. Ms. Kemp testified that if a vote had been taken during the November 2013 BOD meeting relating to approving Defendants' submittal of an elevation drawing, she would have voted no because Defendants had not submitted City approved plans.

157. Ms. Winkler testified that during the November 2013 BOD meeting, no vote was taken to approve or disapprove any action on Lot 36.

158. Ms. Winkler testified that if a vote had been taken during the November 2013 BOD meeting relating to approving Defendants' submittal of an elevation drawing, she would have voted no because Defendants had not submitted City approved plans.

159. The Court finds as a matter of fact that the BOD did not vote to approve Defendants' one (1) page elevation drawing during the November 2013 BOD meeting even though Defendant Richard Weinberg had the discretion as President to include it for consideration and require a vote be taken. The Court further finds that even if a vote had occurred, it would have failed due to a lack of sufficient votes in favor.

160. As an alternative theory of approval to construct their new home, Defendant Richard Weinberg testified that Defendants had not received a denial from either the ACC or the BOD and, therefore, under the ACC&R Defendants' request was deemed approved after thirty (30) days.

161. Defendants only submitted an architectural change request to HVII to demolish their home and never submitted a request to HVII relating to the reconstruction of their home. Trial Exhibit 28 (HV000284-286).

162. Defendant Richard Weinberg testified that the first time Defendants submitted City approved plans to HVII was in March of 2014.

163. The Court finds as a matter of fact that as of November 2013, Defendants had not submitted all the documentation required by the ACC&R and/or the BOD's preliminary approval of Defendants' September 24, 2012 architectural change request precluding automatic approval of Defendants' request under the ACC&R to demolish their home and construct a new home on Lot 36.

164. Although no approval had been obtained from HVII for demolition or reconstruction, Defendant Richard Weinberg testified that Defendants demolished their then existing home in November 2013 and began construction on their new home in early January 2014.

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165. The BOD's preliminary approval of Defendants' September 24, 2012 architectural change request required Defendants to notify their immediate neighbors prior to beginning work. Trial Exhibit 23 (at HV000147).

166. Defendant Richard Weinberg testified that despite the BOD's requirement to do so, Defendants did not notify their immediate neighbors of their intent to demolish their home and construct a new home on Lot 36.

167. Defendant Richard Weinberg further testified that nowhere in the ACC&R is there a requirement to notify immediate neighbors before making an architectural change.

168. Charles Drott testified that he is Defendants' roof-mate and an immediate neighbor.

169. Defendants' own fact witness, Mr. Turner, testified that he believed the Drotts, as roof-mates, should have been notified and their approval sought.

170. The Court finds as a matter of fact that Defendants were required to notify their immediate neighbors before beginning demolition or construction on Lot 36.

171. Mr. Drott testified that Defendants did not notify them of their intent to demolish their home and construct a new home on Lot 36.

172. Mr. Drott further testified that the first time he learned of the Defendants' intent was when the superintendent came over to inform him that the home on Lot 36 was being taken down that day.

173. Mark Brekhus testified that he is an immediate neighbor of Defendants.

174. Mr. Brekhus testified that Defendants did not inform him prior to beginning demolition of their home.

175. The Court finds as a matter of fact that Defendants did not notify their immediate neighbors prior to starting demolition of their home as required by the BOD.

176. In an attempt to obtain approval of their elevation drawing, Defendants represented to Ms. Quinn that they had notified the Drotts, their roof-mates, of their construction intentions. Trial Exhibit 116.

177. Defendants knew their failure to notify and/or obtain approval by the Drotts of their demolition and construction plans was a concern. *Id.*

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178. Rather than take their concern to the ACC or BOD to be addressed, Defendants sought the unilateral approval of Ms. Quinn. *Id.*

179. Ms. Quinn acted on her own without notice to or approval of the ACC or BOD to dismiss the Drotts' right to notice as provided for in the September 24, 2012 Approval. *Id.*

180. Defendant Richard Weinberg testified that there was no BOD meeting in December of 2013.

181. Mr. McCarroll testified that in January 2014, Defendants' home was being framed.

182. Ms. Uhrich testified that shortly after Defendants began constructing their new home in January 2014, MRPOA began receiving numerous complaints from Defendants' neighbors.

183. Ms. Uhrich further testified that as a result of these complaints, MRPOA began investigating Defendants' construction activities.

184. The Court finds as a matter of fact that HVII members began making complaints to MRPOA regarding the construction of Defendants' new home during the time the framing for the new home was going up on Lot 36.

185. MRPOA notified Defendants on or about January 14, 2014, that it had withdrawn its October 2013 approval because the plans submitted by Defendants did not meet the criteria set by HVII. The submittal included an email from the community manager at HVII approving a total height of the center raised to 19 feet or no higher than Lot 27 and that final approval would be given when they see the plans; HVII could not approve the plans based upon the drawings they were given. MRPOA reviewed the plans of Lot 27 and the maximum height of that home was 17 feet. MRPOA could not approve Defendants' submittal since final approval from HVII and revised plans were not submitted prior to commencement of construction. MRPOA informed Defendants that they had to stop construction and submit final plans showing the revised height of the home along with a written approval from HVII; this was the first of a number of cease and desist letters issued to Defendants. Trial Exhibit 41 (HV000163).

186. Defendant Richard Weinberg testified that Defendants did not stop construction of their new home after receipt of MRPOA's January 14, 2014 letter.

187. Defendant Richard Weinberg testified that it would have cost less in January 2014 to stop construction and address the MRPOA's concerns than it will cost to correct them now that construction is complete.

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188. Mr. McCarroll testified that it would have been a lot less expensive to address MRPOA's letter in January 2014 because the construction was in the framing stage, there was no electric, no HVAC, and no roof.

189. Defendant Richard Weinberg testified on direct examination that Defendants did not receive MRPOA's January 14, 2014 letter until late January because it was sent to Defendants' Minnesota home. But on cross examination, Defendant Richard Weinberg admitted that Defendants had filed another architectural change request with MRPOA on January 17, 2014, just three (3) days after issuance of the letter and that someone had given him a copy of the MRPOA letter right away.

190. The Court finds as a matter of fact that Defendants received MRPOA's January 14, 2014 letter after its issuance but did not stop construction on Lot 36 after receipt of the letter.

191. Defendants were expressly informed by MRPOA in the January 14, 2014 letter that if they continued with their construction without prior approval and the subsequent submittal request was denied, Defendants may be responsible for removing any unapproved structure at their own expense. Trial Exhibit 41 (HV000163).

192. Defendant Richard Weinberg further testified that Defendants knew if they had to change the design of their home in order to comply with the DCCA and/or ACC&R they would be required to pay for any and all required changes.

193. The Court finds as a matter of fact that Defendants knew they would be responsible for any costs incurred as a result of continuing to construct their new home on Lot 36 after receipt of MRPOA's January 14, 2014 letter.

194. Just three (3) days after issuance of the January 14, 2014 letter, on January 17, 2014, Defendants submitted a new request for architectural change to MRPOA. Trial Exhibit 42 (MR000017-27).

195. Defendant Richard Weinberg testified that at no time did Defendants change the design of their home. They merely submitted the City approved plans to MRPOA.

196. Defendant Richard Weinberg further testified that Defendants continued to represent to MRPOA that they had received approval from HVII.

197. Mr. McCarroll testified that at no time after January 2014 did he revise the plans for the home on Lot 36 to address homeowner concerns, MRPOA concerns, or HVII concerns.

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198. The Court finds as a matter of fact that Defendants made no changes to existing plans and had not received any additional written approval when they resubmitted their application for architectural change to MRPOA on January 17, 2014.

199. Ms. Uhrich testified that the plans Defendants submitted to MRPOA in January 2014 were not the same plans submitted to MRPOA by Defendants in September 2013 and approved with the height limitation of 17 feet by MRPOA on October 2, 2013.

200. The Court finds as a matter of fact that the plans submitted by Defendants to MRPOA on September 25, 2013 and initially approved at a height of up to 17 feet by MRPOA in October 2013 were not the actual plans Defendants followed in constructing their new home on Lot 36.

201. HVII's property manager notified Defendants by letter dated January 30, 2014 that they had initial approval to proceed to construct a building not to exceed 19 feet and that matched the elevation drawing submitted by Defendants in September 2013. Trial Exhibit 44 (HV000171-173).

202. Defendant Richard Weinberg testified that HVII's property manager did not have the authority to overrule or change the BOD's decisions or actions.

203. Ms. Kemp testified that HVII's property manager did not have authority to issue the January 30, 2014 letter because the BOD had not approved Defendants' elevation drawing.

204. Ms. Kemp further testified that HVII's property manager took direction from the President of the BOD and that in January 2014, Defendant Richard Weinberg was the President of the BOD.

205. The Court finds as a matter of fact that HVII's property manager acted without BOD authority in issuing Defendants the January 30, 2014 letter.

206. Ms. Kemp further testified that the BOD, other than Defendant Weinberg, was not timely provided with a copy of the January 30, 2014 letter and had no timely notice of the issuance of the January 30, 2014 letter.

207. The Court finds as a matter of fact that the BOD was not timely notified of the issuance of the January 30, 2014 letter.

208. MRPOA sent Defendants a second cease and desist construction letter dated February 14, 2014. Trial Exhibit 48 (MR000033-34).



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209. Defendant Richard Weinberg testified that Defendants did not stop construction on their lot upon receipt of MRPOA's second cease and desist letter in February.

210. The Court finds as a matter of fact that Defendants continued to construct their new home on Lot 36 after receipt of the February 14, 2014 second cease and desist letter from MRPOA with full knowledge of the consequences of not obtaining proper approval.

211. HVII first notified Defendants that they must cease and desist all further construction on their property by letter dated February 26, 2014, constituting the third cease and desist notice to Defendants. Trial Exhibit 50 (HV000187-188).

212. HVII's February cease and desist letter notified Defendants that the BOD had determined that the elevation drawing Defendants had submitted for approval was not consistent with the final plans approved by the City of Scottsdale and that Defendants were not following the purportedly approved elevation plans in their actual construction, as required by the January 30, 2014 letter. Defendants were notified that they must stop all construction until they receive a final written approval from HVII, which could not be issued until Defendants provided a complete set of plans and specifications to HVII for review. Defendants were specifically informed that if they continued their construction activities and their final plan submittal was denied, any unapproved alterations would need to be removed and reconstructed to match approved plans at Defendants' own expense. *Id.*

213. Defendant Richard Weinberg testified that Defendants did not stop construction on their lot upon receipt of HVII's February cease and desist letter.

214. The Court finds as a matter of fact that Defendants continued to construct their new home on Lot 36 after receipt of HVII's February 26, 2014 cease and desist letter with full knowledge of the consequences of not obtaining proper approval.

215. On February 27, 2014, Defendants submitted a third request for architectural change to MRPOA. Trial Exhibit 51 (MR000036-38).

216. Defendant Richard Weinberg testified that Defendants did not appeal any of MRPOA's denials, including the withdrawal of its previous approval.

217. Ms. Uhrich testified that Defendants' election to submit a new application rather than appealing a previous decision voided MRPOA's earlier approval.

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218. Defendant Richard Weinberg testified that Defendants did not change their City approved plans or obtain a new approval from HVII following submission of the architectural change request to MRPOA on February 27, 2014.

219. The Court finds as a matter of fact that Defendants made no changes to existing plans and had not received any additional written approvals from HVII when they resubmitted their application for architectural change to MRPOA on February 27, 2014.

220. On February 28, 2014, MRPOA notified Defendants that their February 27, 2014 architectural change request was denied because Defendants had not obtained the necessary prerequisite approval from HVII and advising them that their plans were not approved, attaching Trial Exhibit 50 (HV000187-188), which constituted the fourth notice that Defendants were not authorized to proceed with construction on Lot 36. Trial Exhibit 52 (MR00063-65).

221. On or about March 3, 2014, for the first time, Defendants submitted their actual construction plans and specifications that had been approved by the City of Scottsdale to HVII for approval. Trial Exhibits 53 and 54 (HV000297-318).

222. Defendant Richard Weinberg testified that Defendants waited so long to provide HVII with a copy of the City approved plans because HVII had not requested a copy of the City approved plans and Defendants had been unaware that they needed to submit City approved plans to HVII.

223. On cross examination, Defendant Richard Weinberg testified that he did not review the September 24, 2012 Approval when demolishing and rebuilding their new home on Lot 36, choosing instead to rely on merely what Ms. Quinn unilaterally chose to tell Defendants to submit.

224. On cross examination, Defendant Richard Weinberg further testified that he did not review the ACC&R to refresh his memory on the requirements needed to change the exterior of Defendants' lot until sometime in February 2014 after receipt of HVII's cease and desist letter.

225. Defendant Richard Weinberg further testified during cross examination that as President of the BOD, he was the "mouthpiece" for HVII's residents and had relied upon and threatened enforcements of Art. III against another resident, in early to mid-2013, the time period Defendants were seeking demolition and reconstruction of their home.

226. The Court finds as a matter of fact that Defendants were aware of the requirements of Art. III of the ACC&R during the time period they were seeking demolition and reconstruction of their home on Lot 36.

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227. Defendants' fact witness, Ms. Rogin, testified that she could not offer an opinion as to whether Defendants had complied with the ACC&R and followed the BOD's requirements when constructing their new home.

228. Ms. Rogin further testified that she voted to send Defendants the February cease and desist letter.

229. The Court finds as a matter of fact that Defendants did not submit a copy of the City approved plans to HVII until March 3, 2014 despite instructions by the ACC and BOD to do so in their preliminary approval of Defendants' September 24, 2012 architectural change request and Ms. Quinn's instructions in Trial Exhibit 113.

230. The Court further finds as a matter of fact that March 3, 2014 is the first time Defendants submitted to HVII all required documentation as provided for by Art. III of the ACC&R. Trial Exhibit 1, at page 7 (HV000007-C).

231. On March 11, 2014, nine (9) members of HVII presented a letter to the BOD asking it to immediately commence litigation against Defendants because Defendants had not complied with the ACC&R prior to constructing their new home on Lot 36. Trial Exhibit 55 (HV000189-190).

232. On or about March 12, 2014, after HVII's BOD had conducted a preliminary review of the plans and specifications Defendants had submitted on March 3, 2014, HVII notified Defendants that their architectural variance request was rejected, requested additional information relating to the proposed construction, and again instructed Defendants to cease and desist all construction activity; the fifth cease and desist letter issued to Defendants. Trial Exhibit 56 (HV000191-192).

233. Following the issuance of the fifth cease and desist letter to Defendants dated March 12, 2014, pursuant to the ACC&R, HVII was required to wait ninety (90) days before taking further action against Defendants to allow Defendants time to cure their violation. Trial Exhibit 1, at page 7 (HV000007-C).

234. Defendant Richard Weinberg testified that the ACC&R provides for a 90 day period for a homeowner to correct the changes to their lot after notice by the BOD of the need to do so.

235. The Court finds as a matter of fact that a ninety (90) day cure period began to run against Defendants as of March 12, 2014.

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236. Ms. Kemp testified that HVII offered to work with Defendants to help remedy the concerns over Defendants' construction plans.

237. Defendant Richard Weinberg testified that during the discussions with HVII to resolve the issue over the Lot 36 construction concerns, Defendants demanded that HVII pay for some of the changes necessary to bring Defendants' home in compliance with the ACC&R.

238. The Court finds as a matter of fact that HVII and Defendants engaged in settlement discussions during the 90 day cure period.

239. Defendant Richard Weinberg testified that Defendants continued with the construction of their new home during the time Defendants were meeting with HVII to resolve the dispute over Lot 36.

240. The Court finds as a matter of fact that Defendants continued to construct their new home on Lot 36 during the 90 day cure period.

241. In April 2014, Defendant Laine Weinberg admitted that Defendants knew they did not comply with their obligations to submit detailed construction plans to HVII and MRPOA prior to beginning the construction on their new home. Trial Exhibit 57 (HV000169-170).

242. Defendant Laine Weinberg has further admitted that Defendants had never received a final written approval to begin the construction of their new home. *Id.*

243. The Court finds as a matter of fact that Defendants knew they had to submit detailed construction plans to HVII and MRPOA following the preliminary approval of their September 24, 2012 Architectural Variance request.

244. On or about June 3, 2014, shortly before the expiration of the 90-day cure period, HVII sent Defendants a final notice of violation of the ACC&R affirming its demand that Defendants cease and desist their construction activities and bring their home into compliance with the ACC&R; this was the sixth cease and desist notice to Defendants. Trial Exhibit 58 (HV000196-220).

245. HVII's June 3, 2014 letter continued to express its desire to work with Defendants to bring their construction project into compliance and again informed Defendants that they would be responsible for the costs incurred to bring their construction into compliance. *Id.*

246. Defendants' 90 day period in which to correct their violations of the ACC&R relating to Lot 36 expired on June 12, 2014. *Id.*

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247. Defendant Richard Weinberg testified that Defendants have completed the construction of their new home and obtained a Certificate of Occupancy from the City of Scottsdale dated September 17, 2014. Trial Exhibit 98.

248. Defendant Richard Weinberg testified that the height of their home is 19 feet at its highest point.

249. The Court finds as a matter of fact that Defendants completed the construction of a home on Lot 36 that is 19 feet tall at its highest point.

**Damage Caused by Defendants' Failure to Comply with the ACC&R**

250. Ms. Kemp, HVII's current BOD President, testified that the BOD believes Defendants' home is not aesthetically pleasing and/or consistent with the harmony and conformity of the surrounding area or buildings and that Defendants failed to take their neighbor's views into consideration.

251. Mark Brekhus, a current member of HVII's BOD, testified that the BOD believes Defendants' home is not aesthetically pleasing and/or consistent with the harmony and conformity of the surrounding area or buildings and that Defendants failed to take their neighbor's views into consideration.

252. Defendants' roof-mate, Mr. Drott, testified that he believes Defendants' home is not aesthetically pleasing and/or consistent with the harmony and conformity of the surrounding area or buildings.

253. Mr. Brekhus testified that Defendants' back wall exceeds the limitations allowed by the ACC&R.

254. Ms. Uhrich and Mr. Drott testified that Defendants' home is not staggered in height elevation, emphasizing the height difference between Defendants' home and their roof-mates' home, which shares a wall with Defendants.

255. Ms. Uhrich testified that while two (2) other homes in HVII are 17 feet high at their highest point, most are only 11 feet high, including the homes immediately surrounding Defendants' lot.

256. Ms. Uhrich testified that in approving architectural change requests, MRPOA takes into consideration whether the change in elevation height between roof-mates is staggered or not,

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explaining that a staggered elevation has a less drastic effect on the roof-mate's home and is preferable.

257. Mr. Drott, Defendants' roof-mate, testified that Defendants increased the size of the parapet wall between the two homes resulting in an exaggeration of the sizing of Defendants' home compared to his home.

258. Mr. Brekhus and Mr. Drott testified that the back of Defendants' new home extends further out than the original home.

259. Mr. Brekhus testified that the back extension of Defendants' home interferes with his views of the surrounding area from both inside and outside his home.

260. Mr. Brekhus further testified that the design of Defendants' new home interferes with the enjoyment of his home.

261. Mr. Drott testified that he is concerned the exaggerated parapet wall will cause drainage and heating issues to his property.

262. Mr. Drott further testified that his home now looks like a guest home attached to Defendants' main home, given the huge disparity in size.

263. Mr. Drott further testified that his enjoyment of his home has been diminished. Mr. Drott explained that he never would have purchased his home if Defendants' new home had been built at the time he was buying.

264. Both Mr. Drott and Mr. Brekhus testified that they believe the value of their homes have been diminished because of the massive sizing of Defendants' new home.

265. The Court finds as a matter of fact that the BOD reasonably determined that Defendants' home on Lot 36 is not aesthetically pleasing and/or consistent with the harmony and conformity of the surrounding area or buildings and that Defendants failed to take their neighbors' homes and views into consideration prior to building their new home.

266. Defendant Richard Weinberg testified that Defendants' home was modeled after another home in HVII that has a back bump out.

267. Ms. Kemp testified that Defendants' new home incorporates multiple changes made by different homes in HVII and does not follow any single prior approved architectural change.

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268. Ms. Kemp further testified that an important difference between Defendants' home and the home Defendants modeled their bump out after is that the other home is on a cul-de-sac so that the bump out in the back is not directly in the view of the surrounding neighbors.

269. The Court finds as a matter of fact that Defendants' home does not exactly model any other home in HVII.

**CONCLUSIONS OF LAW**

1. The Court concludes as a matter of law that the ACC&R controls and restricts the types of architectural changes that may be made to any lot within HVII.

2. The Court concludes as a matter of law that Defendants as members of/owners in HVII have a duty to know and follow the provisions and restrictions set out in the ACC&R and DCCA. The Court further concludes that as President of HVII, Defendant Richard Weinberg had a duty to act in the best interest of HVII and to fully comply with all requirements set out in the ACC&R and DCCA.

3. The Court concludes as a matter of law that HVII's ACC and BOD have a duty to follow and enforce the requirements of the ACC&R.

4. The Court concludes as a matter of law that: (i) the preliminary approval given by the HVII ACC and BOD as reflected in Trial Exhibit 23 limited Defendants to a height no greater than Lot 27, which has been established to be a height of 17 feet; and (ii) final approval for Defendants' architectural changes was contingent upon submission to HVII ACC and BOD of the complete set of plans approved by the City of Scottsdale and notice to Defendants' immediate neighbors prior to commencing construction.

5. The Court concludes as a matter of law that Defendants did not obtain prior approval and acted in violation of the ACC&R and HVII's BOD by failing to submit detailed construction plans approved by the City of Scottsdale to obtain final approval prior to demolishing their home and beginning construction of a new home on their lot.

6. The Court further concludes as a matter of law that Defendants were required to obtain the approval of the MRPOA after completion of the HVII approval process.

7. The Court concludes as a matter of law that based upon the failure to obtain HVII approval prior to submission of the variance request to MRPOA, Defendants did not obtain the

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approval required from MRPOA to demolish the building on Lot 36 and concludes further the home that was built on Lot 36 was not approved by MRPOA.

8. The Court concludes as a matter of law that Defendants' conduct including, *inter alia*, ignoring express ACC&R and ACC/BOD requirements, the failure to notify neighbors and the refusal to acknowledge the lack of approval, violated the ACC&R.

9. The Court concludes as a matter of law that HVII's BOD acted reasonably and within their authority under the ACC&R in requiring Defendants to notify their immediate neighbors prior to commencing their demolition and reconstruction.

10. The Court concludes as a matter of law that Defendants violated the ACC&Rs by failing to notify their immediate neighbors of their plans to demolish their home and reconstruct a much larger home on Lot 36, depriving the neighbors of the opportunity to timely object to the design of Defendants' home.

11. The Court concludes as a matter of law that HVII's BOD acted within its authority outlined in the ACC&Rs in considering Defendants' neighbors' views in determining whether the design of Defendants' new home should be approved.

12. The Court concludes as a matter of law that the lack of a vote on Lot 36 does not result in the automatic approval of Defendants' architectural change request due to various factors, including without limitation, Defendant Richard Weinbergs' ability to place the vote on the agenda and failure to do so, the failure by Defendants to submit the required information to the HVII BOD and the conduct of the Defendants in ignoring the stated requirements for variance requests.

13. The Court concludes as a matter of law that HVII's BOD acted reasonably and within its authority on March 12, 2014, when denying Defendants' request to demolish their home and reconstruct a new home after Defendants submitted a complete set of City of Scottsdale approved plans on March 3, 2014.

14. The Court concludes as a matter of law that Defendants misrepresented having obtained approval from HVII to demolish their home and reconstruct another home on Lot 36 to MRPOA when Defendants submitted a variance application to MRPOA.

15. The Court concludes as a matter of law that Defendants acted in violation of the ACC&R and DCCA when they failed to cease construction of their home upon receipt of each of the six cease and desist letters from MRPOA and HVII.



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16. The Court concludes as a matter of law that Defendants assumed the risk of having to bring their new home in compliance with the ACC&R and/or DCCA when they continued to construct their home after at least six notifications that they did not have approval and should cease and desist their construction efforts.

17. The Court concludes as a matter of law that Defendants had a duty to mitigate their damages upon receiving each of the six cease and desist letters from MRPOA and HVII and further concludes that Defendants breached that duty by failing to cease construction pending approval.

18. The Court concludes that Defendant Richard Weinberg had a duty to HVII and its members to fully comply with the provisions of the ACC&R and DCCA without undue burden on HVII. The Court further concludes that the conduct of Defendant Richard Weinberg breached that duty by failing to comply with the express requirements of the ACC&R and DCCA and by refusing to comply with the six cease and desist notices issues by HVII and MRPOA.

19. The Court concludes as a matter of law that the ACC&R required HVII to give Defendants 90 days to correct violations on their lot and that the BOD acted reasonably in attempting to resolve the dispute with Defendants during the cure period before deciding to take action against Defendants.

20. The Court concludes that ACC&R provisions require the Defendants to bring their home into compliance with the ACC&R, in a manner that is aesthetically suitable and in harmony and conformity with the other structures in the surrounding area that does not interfere with other members' enjoyment of their lots.

**RULING**

For the reasons set forth herein in the Court's Findings of Fact and Conclusions of Law and based upon the entire record in this matter,

**IT IS ORDERED** denying Defendants' Motion to Dismiss for Failure to Join Indispensable Parties.

**IT IS FURTHER ORDERED** granting HVII declaratory relief against Defendants. Defendants have violated provisions and requirements of the ACC&R and DCCA and the requirements of the HVII ACC and BOD and MRPOA.

**IT IS FURTHER ORDERED** that Defendants must take action to bring the structure on Lot 36 into compliance with the ACC&R, DCCA and the conditions imposed by the HVII ACC and BOD, as well as the MRPOA.

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As this Court sits in law and equity and in the interest of affording Defendants due process in the remedial phase of this claim.

**IT IS FURTHER ORDERED** that the parties shall in good faith meet and confer within 60 days of this minute entry to determine what remedial measures are, in fact, necessary to bring Lot 36 into compliance with the ACC&R, DCCA, and the requirements of the HVII ACC and BOD and MRPOA. Thereafter and within 90 days of this minute entry, the parties shall submit a joint or separate Status Report advising the Court of the results of their efforts to mitigate, settle or resolve the remedial measures necessary to bring Lot 36 into compliance. In the absence of an agreement, each party shall also submit proposed remedial orders for this Court's consideration. Thereafter, this Court shall entry further and final orders in this matter.

**IT IS FURTHER ORDERED** awarding HVII its reasonable expenses, including reasonable attorney fees, court costs, and taxable expenses. HVII shall timely submit an Affidavit of Fees, and a Statement of Costs.

/s/ HONORABLE J. RICHARD GAMA

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DATE

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JUDICIAL OFFICER OF THE SUPERIOR COURT